No. 14-915

IN THE

Supreme Court of the United States

REBECCA FRIEDRICHS; SCOTT WILFORD; JELENA FIGUEROA; GEORGE W. WHITE, JR.; KEVIN ROUGHTON; PEGGY SEARCY; JOSE MANSO; HARLAN ELRICH; KAREN CUEN; IRENE ZAVALA; and CHRISTIAN EDUCATORS ASSOCIATION INTERNATIONAL,
Petitioners,

v.

CALIFORNIA TEACHERS ASSOCIATION, ET AL.,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

Petitioners' arguments for granting certiorari remain unrebutted. *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), authorized compelled subsidies for collective-bargaining speech. As the Petition established, that result is irreconcilable with fundamental First Amendment principles if, as *Harris v. Quinn* held, 134 S. Ct. 2618 (2014), and as is plainly correct, collective-bargaining speech is speech concerning matters of public concern. No Justice in *Harris* attempted to defend *Abood*'s result if collective-bargaining constitutes such speech. The dissenters instead defended *Abood* on the ground that, contrary to *Abood* itself, "the prosaic stuff of collective-bargaining ... does not become speech of 'public concern' just because those employment terms may have broader consequence." *Id.* at 2655 (Kagan, J. dissenting). It thus appears that no Member of this Court believes there is sufficient justification for imposing agency fees to subsidize speech on matters of public concern, particularly because *Abood*'s lone rationale for that rule—a flawed analogy to private-sector unions—is meritless.

Respondents affirmatively concede that public-sector unions *do* collectively bargain over issues of public concern, and they never defend *Abood*'s private-sector analogy. The parties thus agree that public-sector collective-bargaining is speech on matters of public concern (as *Harris* held) and that *Abood's* private-sector justification is indefensible (and was not defended by any Justice in *Harris*). By neither defending *Abood* on its own terms nor defending the *Harris* dissent's effort to reconcile *Abood* with this Court's other decisions, the Brief in Opposi-

tion *confirms* that *Abood*'s rule is irreconcilable with this Court's precedent. Whether that extraordinarily consequential rule remains good law despite its abandoned rationale and outlier status is amply worthy of this Court's review.

Respondents' only other basis for opposing certiorari is that, even though all agree Petitioners' claims fail under *Abood* regardless of whether their allegations are true, the parties should engage in unspecified factual development before this Court decides whether *Abood* remains good law. That does not make sense, as both the district court and the Ninth Circuit concluded. This Court routinely decides pure legal questions on the basis of pleaded-but-unproven facts, and this case is an especially strong candidate for such review since the parties *agree* on the only material fact—that Respondents extract agency fees from all teachers, including those who object to the speech their money is taken to fund. The record thus squarely presents the Questions Presented.

ARGUMENT

I. Respondents' Defense Of *Abood* Fails.

A. Respondents focus on defending *Abood*'s merits, effectively conceding this issue's importance and the need for review if *Abood* cannot be reconciled with this Court's other decisions.

1. Respondents concede that their collective-bargaining efforts center on matters of tremendous public concern. Specifically, Respondents *agree* that core subjects of collective-bargaining—*e.g.*, "wage policy"—"involve[] matters of public concern as to which 'an employee may very well have ideological

objections.'" Opp.21 (quoting *Abood*, 431 U.S. at 222). That is correct, of course, since the public has an acute interest in the use of *public* funds to provide *public* services—an issue whose magnitude has recently "been driven home" by ballooning public debts stemming in part from unions' wage policy. *Harris*, 134 S. Ct. at 2632.[1] Beyond wage policy, Respondents do not dispute bargaining over numerous issues with important public-policy implications, including class size; procedures for evaluating employees and processing grievances; health and welfare benefits; and leave, transfer, and reassignment policies. California law puts all of these topics on the collective-bargaining table. CAL. GOV'T CODE § 3543.2.[2] And as the president of the California Federation of Teachers recently noted, "[e]very element of public education is political."[3]

Respondents' concession that public-sector collective bargaining involves matters of public concern makes sense; indeed, any contrary argument "flies in the face of reality." 134 S. Ct. at 2642. But in conceding that point, Respondents abandon the only rationale for *Abood* this Court's dissenters in *Harris*

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[1] Given Respondents' bargaining over wage policy, health and welfare benefits, and other topics with serious fiscal ramifications, it is immaterial that these particular unions do not bargain over pensions, Opp.22, which is just one area in which many public-sector unions adversely affect public treasuries.

[2] *See also, e.g.*, Complaint Ex. A at 2-5 , *Friedrichs v. CTA*, No. 8:13-cv-676 (C.D. Cal. Dec. 5, 2013), ECF No. 1 (Collective Bargaining Agreement for San Luis Obispo County).

[3] Matthew Blake, *Teachers Unions Sued Over Dues for Political Activities*, Daily Journal (April 8, 2015).

advanced. There, the dissent recognized that preventing free-riding was insufficient to compel speech on matters of public concern, *id.* at 2654 (Kagan, J., dissenting), but argued that *Abood* was nonetheless correct because "the prosaic stuff of collective bargaining," *id.* at 2655, is *not* of public concern. Since Respondents disavow that argument, they offer no defense of *Abood* that *any* Justice accepted in *Harris*.

2. Respondents insist that compelled subsidization of public-concern speech is justified by the need to prevent free-riding.[4] But both opinions in *Harris* rejected the free-rider rationale where—as here—the subsidized speech pertains to matters of public concern. 134 S. Ct. at 2643; *id.* at 2654 (Kagan, J. dissenting) ("[S]peech in political campaigns relates to matters of public concern ...; thus, compelled fees for those activities are forbidden."). Respondents nonetheless contend that they are uniquely entitled to prevent free-riding because only unions have a "duty" to "not discriminate between members and nonmembers in negotiating and administering collective bargaining agreements." 134 S. Ct. at 2637 n.18; Opp.17-18. This argument fails for at least three reasons (beyond its universal rejection in *Harris*).

First, the nondiscrimination obligation matters only if the union's "approach to negotiations on wag-

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[4] Respondents abandon any interest in "labor peace" other than noting that exclusive representation does not violate the First Amendment. Opp.10-11. Respondents advance no claim, though, that compelled subsidization is essential to preserving their existence as the exclusive representative, thus failing to "pass" the "exacting scrutiny" this Court applied in *Harris*, 134 S. Ct. at 2641. Opp.25-26; Pet.25-26.

es or benefits would be ... different if it were not required to negotiate on behalf of the nonmembers as well as members." *Harris*, 134 S. Ct. at 2637 n.18. But just as Petitioners predicted (Pet.22-23), Respondents cannot identify *anything* they do differently in collective-bargaining as a result of this statutory duty. This justification for *Abood* is thus "weakened." *Harris*, 134 S. Ct. at 2637 n.18.

Second, the statutory obligation to represent all teachers distinguishes Respondents from "organizations such as the American Medical Association," Opp.18, only if it causes Respondents to behave differently from those groups. It does not. Despite having no nondiscrimination mandate, groups that lobby legislatures on behalf of identifiable classes do so to obtain policies or laws (*e.g.*, Medicare reimbursement rates) that inherently apply generally across the represented class (*e.g.*, doctors). Pet.22. Respondents' nondiscrimination against nonmembers is thus no different than the standard practice of every general advocacy group.

Finally, Respondents are, if anything, *less* entitled to demand tribute because they have the unique ability to *bind* nonmembers to their policies, while foreclosing competing advocacy. Pet.24-25. Respondents retort that a nonmember can object at the hearing where a CBA is approved (Opp.18), but that just highlights the deprivation. The nonmember can object (ineffectively) to the Union's preferred policy of, say, seniority-based wages, but has no ability to meaningfully advocate an alternative.

3. Respondents specifically emphasize the union's duty to "handle a nonmember's grievance under

a collective bargaining agreement just as it would handle a member's grievance, notwithstanding the costs involved." Opp.17. But "grievance" representation is distinct from collective-bargaining, so the alleged benefits of the former cannot justify compelled subsidization of the latter. Speech restrictions have to be narrowly tailored to the purpose they serve. *See, e.g.*, *United States v. Alvarez*, 132 S. Ct. 2537, 2551 (2012) (restriction "must be the 'least restrictive means among available, effective alternatives'" (citation omitted)). That principle requires Respondents to recoup the costs of grievance representation by charging nonmembers *solely for* grievance representation, not *also* for collective bargaining. Respondents cannot justify broadly compelling the subsidization of political speech on the ground that a tiny fraction of those compelled payments supports a nonspeech activity.

Respondents also exaggerate the scope of this obligation. This duty means only that Respondents will represent an "employee" who makes an "allegation that there has been a violation of ... this Agreement." Complaint Ex. A at 43, *Friedrichs*, No. 8:13-cv-676. For teachers who *oppose* their Collective Bargaining Agreements, that service has marginal value. Conversely, Respondents do not assist nonmembers on matters that *would* tangibly benefit them—*e.g.*, resisting discipline or termination. As Respondents themselves emphasize, disciplinary and termination proceedings are creatures of statute. Opp.2 n.1, 22-23 & n.13. Respondents have *no* obligation to represent nonmembers in those proceedings. And in fact, they refuse to do so. *See* Complaint Ex. E at 9, *Bain v. CTA*, No. 2:15-cv-2465

(C.D. Cal. Dec. 5, 2013), ECF No. 1-5 (CTA website: "Agency fee payers are not eligible for ... employment-related legal services").

4. Respondents are thus fundamentally no different from the SEIU in *Harris*. There, the SEIU represented workers in challenging "the State's failure to perform its duties under the collective-bargaining agreement," *but not* in "'griev[ing] the[ir] ... termination.'" 134 S. Ct. at 2637 n.17 (citation omitted). Indeed, Respondents have not identified anything that gives them a greater entitlement to fees than the SEIU had. To the contrary. as Respondents repeatedly emphasize, they do not bargain over important issues like pensions, tenure, or termination. Opp.22. Respondents' "authority and responsibilities are" thus "narrow," such that "the argument for *Abood* is weakened." *Harris*, 134 S. Ct. at 2637 & n.18.

5. In any event, however one interprets *Harris*'s repudiation of free-riding for some collective-bargaining arrangements, its holding indisputably undermines *Abood*'s categorical rule allowing agency fees for *all* public-sector unions. At an absolute minimum, then, this Court should grant the Petition to explain why public-sector unions at *Abood*'s core (like Respondents) are entitled to agency fees, while comparable unions (like the SEIU in *Harris*) are not, as well as to clarify where that line is drawn.[5]

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[5] Respondents offer no response to Petitioners' *stare decisis* arguments, other than suggesting that *Harris* effectively reaffirmed *Abood*. Opp.14-15. But *Harris* explicitly rejected that interpretation. 134 S. Ct. at 2638 n.19.

B. On the second Question, other than extolling the supposed "simplicity" of opting out, Opp.28, Respondents offer virtually no defense of the requirement that public employees annually and affirmatively halt the confiscation of their wages to subsidize concededly political activities unrelated to collective-bargaining. Respondents' sole argument is that "opting out" does not impose a cognizable "burden or risk that impairs First Amendment rights," because "all that a nonmember need do" to prevent such compelled subsidization is "check a box on a form and return the form to CTA." *Id.* But the ease of the process is irrelevant.

The First Amendment forbids requiring citizens to *rebut* "presume[d] acquiescence in the loss of fundamental rights." *Knox v. Serv. Emps. Int'l Union*, 132 S. Ct. 2277, 2290 (2012). Since political donations must be free of governmental influence, the Government cannot *ever* require citizens to *affirmatively prevent* it from conscripting their financial support for ideological speech, regardless of how easy it is to prevent that conscription. After all, if Respondents were correct that presuming consent to subsidize political speech does not "impair[] First Amendment rights," Opp.28, then California could direct 1% of every employee's wages to the Democratic Party so long as employees could "check a box on a form" to avoid that deduction. *Id.* But that would obviously violate the First Amendment because failing to affirmatively "opt-out" of political contributions is materially different from voluntarily making such contributions. And capitalizing on the inertia and ignorance that distinguishes voluntarily donat-

ing from failing to opt-out is *why* Respondents are so insistent on preserving this regime.

This Court should directly consider whether (and if so, why) unions enjoy the unique ability to presumptively receive subsidies for purely political speech. This practice was authorized by "historical accident" rather than through reasoned analysis. *Knox*, 132 S. Ct. at 2290. Its direct consideration is long overdue.

In addition, Respondents' insistence that objections be annually renewed supports granting certiorari, as this issue has divided the circuits. Pet.35-36. Respondents do not—and cannot—dispute that their regime would be unconstitutional in the Second and Fifth Circuits, but permissible in the Sixth and Ninth Circuits.

II. This Case Is The Ideal Vehicle For Considering The Questions Presented.

1. Respondents claim that this Court should deny review and wait for a case with a more developed factual record. That does not make sense. Petitioners are advancing the argument—which *Knox* and *Harris* support—that the First Amendment *categorically prohibits* Respondents from imposing agency fees on dissenting employees to fund collective-bargaining because public-sector collective-bargaining is political speech. Under *Abood*, by contrast, Respondents are *categorically entitled* to collect agency fees for all expenses germane to collective-bargaining, regardless of whether bargaining is political speech. That is what Respondents acknowledged below, what the district court easily concluded in entering judgment on the pleadings against Petition-

ers, Pet.App.3a-8a, and what the Ninth Circuit concluded in summarily affirming that decision, Pet.App.1a-2a.

There is only one fact necessary to choose between these categorical rules, and it is undisputed: Respondents admit they confiscate Petitioners' money against their will to fund Respondents' collective-bargaining efforts. Both sides further agree that Respondent's bargaining speech "involves matters of public concern." Opp.21. Thus, in both its undisputed facts and that uncontested legal premise, this case squarely presents the question of whether *Abood*'s categorical sanction of public-sector agency fees remains good law.

Respondents argue that the Court should await a case with "a factual record." Opp.22. But there will *never* be a Petition challenging *Abood* that follows a "developed" record, because lower courts must follow decisions of this Court "which directly control[]." *Agostini v. Felton*, 521 U.S. 203, 207 (1997). District courts cannot overturn *Abood* and cannot preside over trials wherein binding Supreme Court precedent has foreordained the result *regardless* of what facts the district court finds. The only way to directly revisit *Abood* is thus via a case that a district court has correctly dismissed as a matter of law. Should this Court grant the Petition and craft a constitutional rule under which specific objections *do* matter, the parties will simply litigate on remand whatever facts this Court's decision makes relevant.

Nor would this Court *want* a case with specific fact-finding. Courts resolve only *material* factual disputes, which, under *Abood*, will be facts that pro-

vide a *basis to distinguish it*. Such cases will necessarily present a narrower potential rule of decision and will "not require [this Court] to reconsider that precedent," *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 614-15 (2007) (plurality op.)—just as happened in *Harris*. Petitioners' challenge thus comes to this Court in the ideal posture—indeed, the only plausible posture—for reconsidering *Abood*.[6]

2. Finally, Respondents seem to suggest that under the hypothetical rule this Court will adopt upon reconsidering *Abood*, Petitioners' detailed Complaint will fail to satisfy the basic standards of notice pleading. Opp.25. That is wrong. A Complaint is sufficient when it alleges a claim "'that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). It is entirely plausible that Petitioners, all of whom have consistently objected to Respondents' lobbying efforts, would likewise object to collective-bargaining efforts pursuing the *same* policies. *See* Pet.19-20. Teachers who oppose *lobbying* for seniority-based (rather than merit-based) statutes, for instance, would obviously also oppose *bargaining* for seniority-

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[6] This Court routinely resolves important legal questions—including in *Harris*—on the basis of unproven allegations. *E.g.*, *Skinner v. Switzer*, 131 S. Ct. 1289, 1296 (2011); *District of Columbia v. Heller*, 554 U.S. 570, 576 (2008). Because Respondents prevailed on the pleadings below, the Complaint is, of course, taken as true: "[T]he standard to be applied on a Rule 12(c) motion based on all the pleadings is identical to that used on a Rule 12(b)(6) motion based solely on the complaint." 5C Fed. Prac. & Proc. Civ. § 1368 (3d ed.). Respondents' contrary citation, Opp.25 n.16, is not actually to the contrary; it was merely describing the typical situation in which the prevailing party is also the moving party.

based (rather than merit-based) contractual provisions.

Petitioners have not alleged every individual disagreement with Respondents' bargaining positions because they object *generally* to "the State's forced subsidization policy" and to *many* "of the unions' public policy positions, including positions taken in collective bargaining." Pet.App.47a-50a. "Under well-accepted First Amendment doctrine, a speaker's motivation is entirely irrelevant to the question of constitutional protection." *F.E.C. v. Wis. Right To Life, Inc.*, 551 U.S. 449, 468-69 (2007) (Roberts, C.J.) (quotation omitted). Petitioners' allegations that they object to subsidizing Respondents' bargaining efforts and "to many of the unions' public policy positions, including positions taken in collective bargaining," Pet.App.46a-50a, are thus more than sufficient.

Respondents also counter that objections to the unions' wage policies are implausible, since "teachers ... generally view increased teacher salaries as beneficial." Opp.24. But Respondents themselves recognize that "wage policy" is a matter of public concern, Opp.21, such that it is inherently something about which teachers can plausibly disagree. And even assuming every teacher wants more money at taxpayer expense, some will object to Respondents' policies favoring *seniority*-based pay over *merit*-based pay. *See* Pet.App.45a-46a (Complaint alleging as much).

3. This Court should see Respondents' vehicle arguments for what they are—last-ditch efforts to forestall the reconsideration of *Abood*. Each day that passes with *Abood* intact is another day that Re-

spondents get to spend agency fees collected from Petitioners, their thousands of fellow California teachers, and, for respondent NEA, the many thousands of other teachers across the country who are currently unwillingly conscripted in its causes. This Court has twice suggested that these arrangements are constitutionally questionable. It should not permit this multi-million-employee, multi-billion-dollar regime to continue without squarely addressing its constitutional legitimacy. The Court should therefore grant the Petition and finally give this First Amendment issue the consideration it deserves.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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